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No. 89-376

Supreme Court, U.S.

FILED

OCT 3 1989

JOSEPH F. SPANIOL, JR.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,  
*Petitioner,*

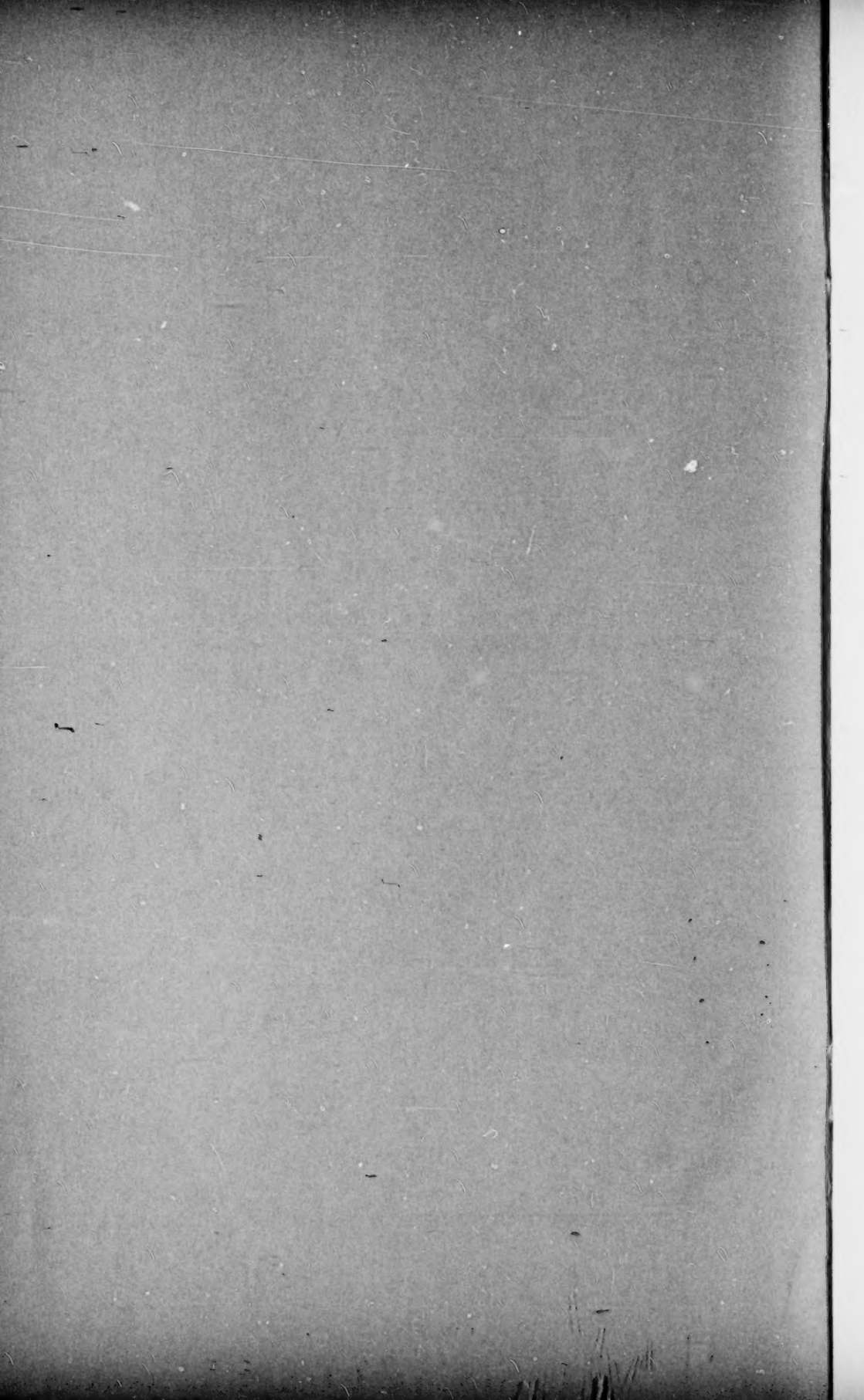
v.

GLORIA TREVINO, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE  
CHAMBER OF COMMERCE OF THE UNITED STATES  
IN SUPPORT OF THE PETITIONER

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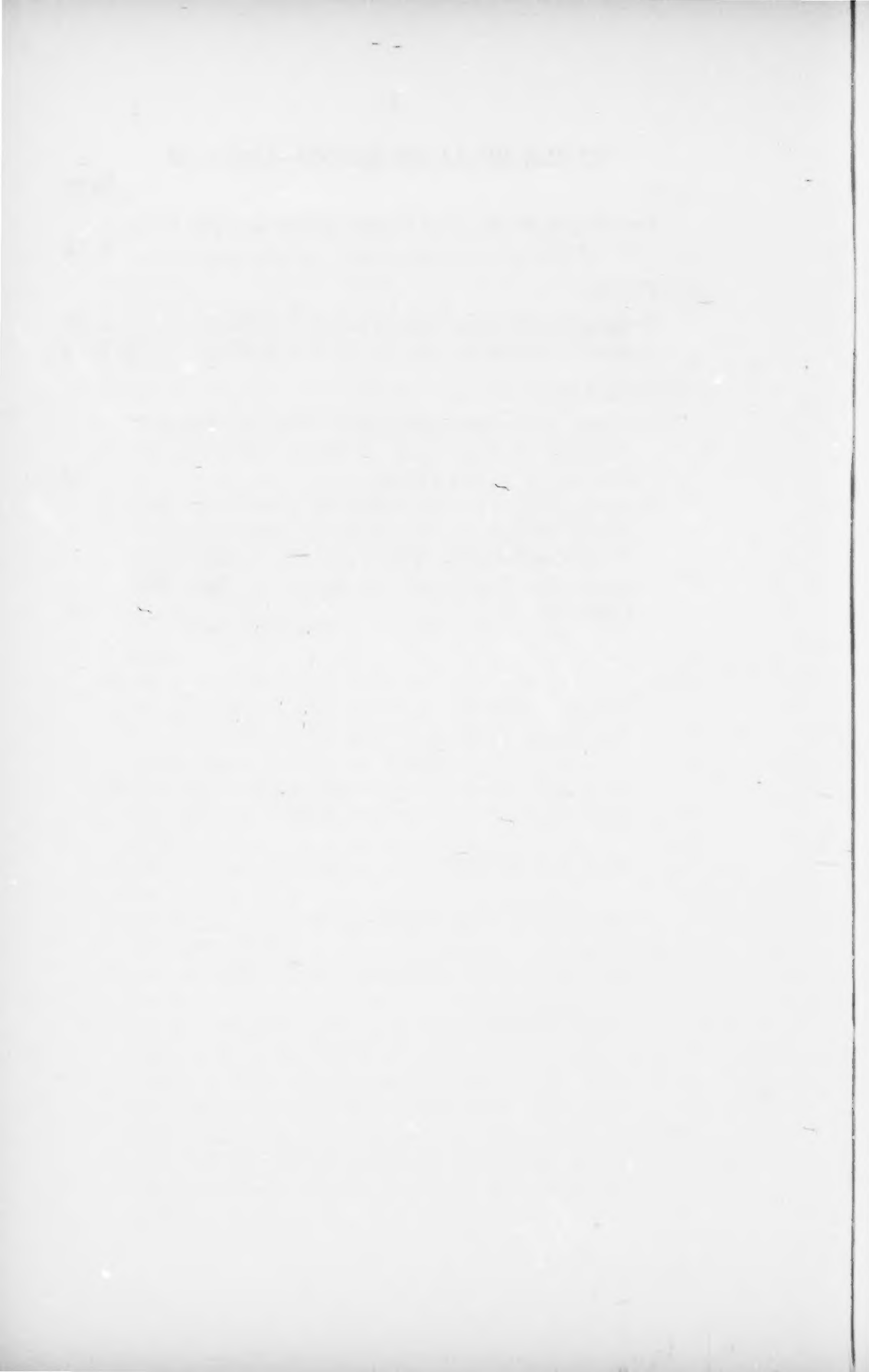
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**BRIEF AMICUS CURIAE OF THE  
CHAMBER OF COMMERCE OF THE UNITED STATES  
IN SUPPORT OF THE PETITIONER**

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**INTEREST OF THE AMICUS CURIAE**

With the written consent of the parties,<sup>1</sup> the Chamber of Commerce of the United States ("Chamber") respectfully submits this brief *amicus curiae* in support of the Petitioner, General Dynamics Corporation. The Chamber is the nation's largest federation of business organizations and individuals. Its membership includes over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade and professional associations, and state and local chambers of commerce.

Many Chamber members, both large and small businesses, are involved in the defense industry and partici-

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<sup>1</sup> Letters of consent are on file with the Clerk of the Court.

pate in the design and manufacture of military equipment for use by and under contracts with the United States government. The Chamber regularly represents the interests of these government contractor members on issues of national concern before Congress,<sup>2</sup> the Executive branch<sup>3</sup> and the courts.<sup>4</sup> Most recently, the Chamber filed an *amicus* brief before this Court on their behalf in *Boyle v. United Technologies Corp.*, — U.S. —, 108 S. Ct. 2510 (1988), a landmark case which provided government contractors with much needed protection from state tort liability for design defects in military equipment. In *Boyle*, this Court recognized a government contractor defense as a matter of federal common law and set forth a three-part test for determining the scope of contractor immunity. Under this test, a government

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<sup>2</sup> See e.g., Comments of the Chamber of Commerce of the United States on H.R. 2579, the "Defense Contractor Whistleblower Act of 1989," submitted to the House Committee on Armed Services (July 10, 1989); Statement of the Chamber of Commerce of the United States on H.R. 3911, the "Major Fraud Act of 1988," submitted to the Senate Committee on the Judiciary (July 12, 1988); and Statement of the Chamber of Commerce of the United States on the "Reauthorization of the Office of Federal Procurement Policy," submitted to the Subcommittee on Federal Spending, Budget and Accounting of the Senate Committee on Governmental Affairs (March 25, 1988).

<sup>3</sup> See e.g., Comments of the Chamber of Commerce of the United States on General Services Administration Proposed Rule on "Procurement Integrity," Federal Acquisition Regulation (FAR) Case 89-23 (April 26, 1989) and Comments of the Chamber of Commerce of the United States on General Services Administration Interim Rule on the "Drug-Free Workplace Act of 1988 (April 5, 1988)

<sup>4</sup> The Chamber has filed *amicus* briefs on behalf of its government contractor members in a number of important cases at the lower court level. See e.g., *U.S. v. Westinghouse Electric Corp.*, 615 F. Supp. 1163 (D.C. Pa. 1985) *aff'd*, 788 F.2d 164 (3d Cir. 1986); *U.S. v. Newport News Shipbuilding and Dry Dock Co.*, 837 F.2d 162 (4th Cir. 1988) ("Newport News I"); and *U.S. v. Newport News Shipbuilding and Dry Dock Co.*, 655 F. Supp. 1408 (E.D.Va. 1987) ("Newport News II").

contractor must prove (1) that the government approved reasonably precise specifications; (2) that the equipment conformed with those specifications and (3) that the contractor warned the government about the dangers in using the equipment known to it but not to the government.

As *amicus curiae* in *Boyle*, the Chamber urged the Court to adopt a simple test for contractor immunity—similar to the one articulated in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940), the only Supreme Court precedent on the subject of a government contractor defense.<sup>5</sup> Under a *Yearsley* approach, a military contractor would not be liable in tort for injuries resulting from a “uniquely military” product that was put to “military use.”

The Chamber argued in its *amicus* brief that a *Yearsley*-type defense—which would focus only on the nature of the product and its use—would substantially minimize judicial scrutiny into military decisionmaking and add certainty to the scope of contractor immunity from tort liability. The Chamber also predicted that a simple *Yearsley*-type defense would prevent courts from becoming mired in questions of how to construe each element of a more complicated government contractor defense.

As the first post-*Boyle* decision to reach this Court, *Trevino v. General Dynamics Corp.*, 865 F. 2d 1474, *reh'g denied*, 876 F.2d 1154 (5th Cir. 1989), is a classic example of the judicial interpretation problems that can result from complicated multi-part tests. By holding that government “approval” under the first prong of the

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<sup>5</sup> The *Yearsley* Court held a public works contractor immune from liability essentially because it was carrying out the will of the government. 309 U.S. 20-21.

*Boyle* test must be equivalent to the exercise of a discretionary function under the Federal Tort Claims Act,<sup>6</sup> the Fifth Circuit has added a complex layer of analysis to the governmental contractor defense never intended by this Court.

Rather than eliminating the uncertainty surrounding the application of the government contractor defense, as was *Boyle's* intent, the Fifth Circuit grafted a confusing body of case law onto the first prong of the *Boyle* test which renders the test completely unworkable. In so doing, the *Trevino* court has seriously undermined this Court's decision in *Boyle* and significantly eroded the government contractor defense.

On behalf of the American business community, the Chamber urges this Court to correct the Fifth Circuit's error and prevent further erosion<sup>7</sup> of *Boyle* and the protection it affords government contractors. For these and the reasons stated below, the Chamber respectfully re-

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<sup>6</sup> The FTCA is an express waiver of sovereign immunity which allows the federal government to be sued for monetary damages for harm caused by negligent or wrongful conduct of federal employees. 28 U.S.C. § 1346(b), 2671-2680. Under the discretionary function exception, however, the FTCA retains sovereign immunity for any claim "based on the exercise or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). What constitutes a "discretionary function" is the subject of much confusion and a continually growing body of caselaw. See generally, *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)* 467 U.S. 797 (1984).

<sup>7</sup> See, *In Re New York City Asbestos Litigation*, Index No. 17516-87 et al., 1989 N.Y. Misc. Lexis 315, 5 (N.Y. Sup. Ct. May 9, 1989)

("In order to satisfy the first element of the *Boyle* test, not only must there be governmental approval of design of the product, but such approval must be a discretionary function of the government.")

quests this Court to grant General Dynamics' *Petition for a Writ of Certiorari* in this case and reconsider a *Yearsley*-type approach for determining what constitutes government "approval" of design specifications under the *Boyle* defense.

### STATEMENT OF THE CASE

This case arises out of an accident in which five Navy scuba divers died from vacuum-induced bends in the diving chamber of a Navy submarine. The cause of death was attributed to the failure of the ventilation valve of the diving chamber to be fully opened, which prevented air from entering the chamber while releasing water from it. The accident occurred on January 16, 1982, approximately twenty years after the Navy established the basic design concept for converting the submarine into a personnel-carrier capable of dispatching divers underwater.<sup>8</sup> Not only did the Navy develop the design details for the diving chamber, but it also built, tested and installed the chamber in the submarine at a naval shipyard of its choice.

The Navy had contracted with the General Dynamics Corporation ("General Dynamics") in 1966 and 1967 to produce working drawings of the diving hangar and its "lock in/lock out" system, which allowed divers to exit and re-enter the submarine through a flooded diving chamber. General Dynamics completed its contract in 1968, having produced 31 working drawings for the Navy. Each of those drawings was reviewed and "approved" by Navy personnel on separate, individual signature blocks. The Navy exclusively performed and com-

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<sup>8</sup> The Navy set forth its design concept for the diving chamber in a 339-page circular of requirements, called a "COR". Included in the "COR" was a two-page description of the diving hangar design and a one-page diagram of the chamber's flood and drain system (otherwise known as the "lock in/lock out system").

pleted all manufacturing and conversion work on the submarine, including the construction and installation of the diving chamber, during the following year.

Between 1969 and 1982, when the accident occurred, the Navy used the diving chamber<sup>9</sup> as designed without alteration, despite its actual knowledge that the ventilation valve was difficult to open and its control handle was difficult to see.<sup>10</sup> Notwithstanding such notice, the Navy chose not to conduct a formal design/safety review of the diving system until after the accident occurred.

The families of the divers sued the Navy and General Dynamics in the U.S. District Court for the Eastern District of Texas for strict liability, negligence and breach of warranty. *Trevino v. General Dynamics Corp.*, 626 F. Supp. 1330 (E.D. Tex. 1986). The Navy claimed immunity from suit under the *Feres/Stencel* doctrine.<sup>11</sup> General Dynamics raised the government contractor defense.

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<sup>9</sup> According to the Petition for a Writ of Certiorari, the Navy used the diving chamber 555 times during those years. *See Pet. Cert.* at 3.

<sup>10</sup> The Navy had been informed by its own personnel "on at least four occasions that the ventilation valve control was difficult to turn." *Trevino v. General Dynamics Corp.*, 856 F.2d 1474, 1477 (5th Cir. 1989).

<sup>11</sup> The *Feres/Stencel* doctrine of government immunity from tort liability derives from two Supreme Court cases. In *Feres v. United States*, 340 U.S. 135, 146 (1950), the Court held that the "[g]overnment is not liable under the Federal Torts Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." In *Stencel Aero Engineering Corporation v. United States*, 431 U.S. 666 (1977), the Court broadened the scope of government immunity by barring contractors from seeking indemnity from the government for damages arising out of service-related injuries to members of the armed forces.

The district court found that the Navy and General Dynamics were both negligent. It apportioned 80% of the liability to General Dynamics for the design of the diving chamber and 20% to the Navy for failure to maintain the chamber and adequately train the divers in how to deal with the possibility of vacuum formation. Nevertheless, the court upheld the Navy's defense, but refused to grant General Dynamics' claim for immunity under a pre-*Boyle* version of the government contractor defense.<sup>12</sup> The district court held that General Dynamics could not avail itself of the defense because it, and not the Navy, had performed the design work in question.

The U.S. Court of Appeals for the Fifth Circuit affirmed. Focusing exclusively on the first prong of the government contracts defense established by this Court in *Boyle v. United Technologies Corporation*, — U.S. —, 108 S. Ct. 2510 (1988),<sup>13</sup> the Fifth Circuit held that government "approval under the defense must constitute a discretionary function" within the meaning of the Federal Tort Claims Act, 28 U.S.C. § 2680 (a). *Trevino*, 865 F.2d at 1480. Accordingly, the Fifth Circuit found that General Dynamics did not meet the first prong of the *Boyle* test because the Navy did not conduct a "substantive review and evaluation of the contractor's design choices." *Id.* at 1486.

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<sup>12</sup> *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985). In *Bynum*, the prevailing case in the Fifth Circuit at the time, the "reasonably precise specifications" were established by the government, and not the contractor; thus, the Court never reached the question of what constitutes approval.

<sup>13</sup> The Fifth Circuit issued its opinion less than one year after this Court decided *Boyle*.

## SUMMARY OF THE ARGUMENT

The Fifth Circuit's wholesale importation of the discretionary function doctrine into the "approval" element of the government contractor defense completely distorts this Court's discussion of that exception to the Federal Tort Claims Act ("FTCA") in *Boyle*. This Court relied on the discretionary function exception as a philosophical predicate for recognizing a government contractor defense under federal common law. It did not intend for the doctrine to be incorporated as an element of the *Boyle* defense itself.

By equating government "approval" with the exercise of a discretionary function under the FTCA, the Fifth Circuit has grafted onto the first prong of the government contractor defense a confusing body of case law that intricately involves the judiciary in military decisionmaking. The degree of scrutiny required by the Fifth Circuit to determine whether the government performed a "substantive review and evaluation"<sup>14</sup> which "involve[d] the use of policy judgment"<sup>15</sup> will invariably result in the same kind of judicial scrutiny of military decisions this Court tried to avoid by establishing a government contractor defense under federal common law in *Boyle*.

The unnecessary complexity of the Fifth Circuit's interpretation of the first prong of the *Boyle* test could itself have been avoided had this Court adopted a *Yearsley*-type government contractor defense in the first place. Determining whether a product is military or commercial is a relatively simple process requiring no intrusion by the courts into military decisionmaking. Evidence that a product was put to a military use can be proved in several ways, none of which require the judiciary to second-guess procurement decisions.

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<sup>14</sup> *Trevino*, 865 F.2d at 1480.

<sup>15</sup> *Id.*

## REASONS FOR GRANTING THE WRIT

### I. The Fifth Circuit Erred In Making Government Approval Equivalent To Exercising A "Discretionary Function."

In *Trevino v. General Dynamics Corp.*, the Fifth Circuit refused to grant the Petitioner the protection of the government contractor defense because it did not satisfy the "approval" element of the *Boyle test*. 865 F.2d 1474, 1479 (1989). According to *Trevino*, "approval under the defense must constitute a discretionary function" within the meaning of the Federal Tort Claims Act. *Id.* at 1480. The *Trevino* court defined discretionary functions as government acts "that involve the use of policy judgment" requiring "substantive review or evaluation." *Id.* It further required that the government exercise its discretion "over significant details and all critical design choices." *Id.* at 1481.

The Fifth Circuit based its interpretation of government "approval" on this Court's discussion of the discretionary function doctrine in *Boyle v. United Technologies Corp.*, — U.S. —, 108 S. Ct. 2510 (1988). In so doing, the Fifth Circuit has completely distorted the role of the doctrine in the *Boyle* Court's analysis of the government contractor defense as a matter of federal common law. This Court should grant General Dynamics' *Petition for a Writ of Certiorari* to correct the Fifth Circuit's error.

#### A. *Trevino* Distorts This Court's Use Of The "Discretionary Function Doctrine" In *Boyle*.

In *Boyle*, this Court established a three-part test under federal common law for determining contractor immunity from state tort actions arising out of design defects in military equipment. Under this test, a government contractor would not be liable for design defects under state tort law if it could prove that (1) the government approved reasonably precise specifications; (2) the equip-

ment conformed to those specifications; and (3) the contractor warned the government about the dangers known to the contractor, but not the government.

As a prerequisite for federal common law displacement of state law, the Court noted that there must be a "significant conflict between the state law and a federal policy or interest." *Boyle*, 108 S. Ct. at 2516. The Court identified "the procurement of equipment by the United States"<sup>16</sup> as providing a "'uniquely federal' interest"<sup>17</sup> and selected the discretionary function exception of the Federal Tort Claims Act ("FTCA")<sup>18</sup> as the basis for the "significant conflict."<sup>19</sup> Under an express waiver of sovereign immunity, the FTCA allows the federal government to be sued for monetary damages for harm caused by the negligent or wrongful conduct of federal employees. The discretionary function exception, however, retains sovereign immunity for any claim "based on the exercise or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

By predicating the government contractor defense on the discretionary function doctrine, this Court significantly altered the approach previously taken in applying the government contractor defense. Scadron, *The New Government Contractor Defense: Will It Insulate Asbestos Manufacturers From Liability For The Harm Caused By Their Insulation Products?*, 25 Idaho L. Rev. 375, 377 (1988-89). Prior to *Boyle*, the majority of federal courts

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<sup>16</sup> *Id.* at 2515.

<sup>17</sup> *Id.* at 2514.

<sup>18</sup> 28 U.S.C. § 1346(b), 2671-2680.

<sup>19</sup> *Id.* at 2517.

pointed to the *Feres-Stencel* doctrine,<sup>20</sup> which immunizes the government from tort liability arising out of injuries to service personnel, as the predicate of the defense. The *Boyle* Court rejected *Feres-Stencel* as the source of the "significant conflict between federal interests and state law"<sup>21</sup> because the doctrine produced results that were simultaneously "too broad" and "too narrow" when applied to government contractor liability. *Id.* The Court viewed *Feres-Stencel* as "too narrow" a basis for justifying federal displacement of state law because the doctrine covers only service-related injuries and could not be invoked to prevent a civilian's suit against a military contractor. *Id.* At the same time, the Court also found the *Feres-Stencel* doctrine to be "too broad" a basis for displacement because it would deny recovery for injuries caused by standard equipment purchased by the government from stock. *Id.*

This Court's choice of discretionary function over *Feres-Stencel* as the predicate for the government contractor defense also significantly broadened the application of the defense. As stated above, *Boyle* relied on the discretionary function exception as a philosophical predicate for recognizing a government contractor defense under federal common law. Nothing in the *Boyle* opinion remotely suggests that the doctrine itself should be incorporated as part of the *Boyle* test. The Court's statement that the first two elements of the *Boyle* defense "assure that the suit is *within the area* where the *policy* of the 'discretionary function' would be frustrated,"<sup>22</sup>

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<sup>20</sup> In *Feres v. U.S.*, 340 U.S. 135 (1950), the Supreme Court found that a member of the armed forces did not have a cause of action under the FTCA for service-related injuries. In *Stencel Aero Engineering Corporation v. U.S.*, 431 U.S. 666 (1977), the Supreme Court held that a contractor had no right to indemnification against the government when it was found liable to a service member.

<sup>21</sup> *Boyle*, 108 S. Ct. at 2517.

<sup>22</sup> *Id.* (emphasis added).

serves only to support its recognition of the discretionary function doctrine as the proper policy basis for federal displacement of state law. The Fifth's Circuit's wholesale importation of the discretionary function doctrine engrafts on the *Boyle* test a requirement that totally distorts this Court's displacement analysis. For this reason alone, the Court should grant the *Petition for a Writ of Certiorari*.

**B. Government "Approval" Under *Trevino* Will Result In The Same Kind Of Excessive Judicial Scrutiny This Court Sought To Avoid In *Boyle*.**

The purpose of the discretionary function exception is to allow members of the executive branch to carry out policy decisions without unwarranted judicial interference. Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 47 Ohio St. L. J. 985, 989 (1986). This Court recognized that purpose when choosing the discretionary function exemption as the "limiting principle" for determining the scope of federal displacement of state tort law in *Boyle*. Specifically, the Court noted:

We think that the selection of the appropriate design for military equipment to used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely balancing engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting 'second-guessing' of these judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption.

*Boyle*, 108 S. Ct. at 2517-8 (citations omitted). By making government "approval" equivalent to exercising a discretionary function under the FTCA, the *Trevino* court

has undermined this Court's effort to limit judicial interference in the military procurement process. The degree of scrutiny required by the Fifth Circuit of a trier of fact to "locate the actual exercise of the discretionary function"<sup>23</sup> and determine whether it "involve[s] the use of policy judgment,"<sup>24</sup> will invariably result in the same kind of excessive judicial investigation and evaluation of military decisions this Court tried to avoid in *Boyle*.

The confusing status of discretionary function case law<sup>25</sup> only exacerbates this concern. Due in part to infrequent Supreme Court review,<sup>26</sup> the lower courts have

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<sup>23</sup> *Trevino*, 865 F.2d at 1430.

<sup>24</sup> *Id.*

<sup>25</sup> In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811 (1984), the Court acknowledged that the discretionary function exception "admittedly has not followed a straight line."

<sup>26</sup> This Court has reviewed only three discretionary function cases since 1953, and in each has broadly defined the scope of government activity that falls within the discretionary function exception to the FTCA. See *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953) ("determinations made by executives or administrators in establishing plans, specifications or schedules of operations fall within the discretionary function exception . . . . Where there is room for policy judgment and decision there is discretion."); *Varig Airlines*, 467 U.S. 797, 813 (1984) ("it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case . . . . Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."); *Berkovitz v. United States*, — U.S. —, 56 U.S.L.W. 4549, 4551 (U.S. June 14, 1988) ("The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.").

continued to develop vague<sup>27</sup> and inconsistent tests<sup>28</sup> for determining what constitutes a discretionary function under the FTCA. This Court should grant the *Petition for a Writ of Certiorari* to prevent the *Trevino* decision from subjecting the "approval" element of the government contractor defense to the same kind of confusion.

## II. A Simple *Yearsley*-type Test For Government "Approval" Would Minimize Judicial Scrutiny Of Military Decisions And Add Certainty to the Government Contractor Defense.

The implications of the *Trevino* court's requirement that government "approval" of design specifications "must constitute a discretionary function,"<sup>29</sup> are disturbing as a matter of policy as well as practice. Not only does the Fifth Circuit subvert this Court's efforts to protect military decisionmaking from undue judicial scrutiny, but it also substantially eliminates the certainty *Boyle* provided to the scope of contractor immunity from state tort liability.

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<sup>27</sup> See *Allen v. United States*, 816 F.2d 1417, 1420 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 694 (1988) ("The key term, 'discretionary function,' is not defined. For over thirty-five years the federal courts have been attempting to define it." *Accord Dube v. Pittsburgh-Corning*, Civil No. 83-0224 P, 1988 U.S. Dist. Lexis 5739 (D. Me. June 9, 1988) ("Indeed, having reviewed scores of cases—and the multitude of cases litigated on the topic is itself a demonstration of the inadequacy of prior pronouncement—I conclude that no principled distinction has yet been articulated."); *Blessing v. United States*, 447 F. Supp. 1160, 1167 (E.D. Pa. 1978) ("Rather than a seamless web, however, we found the law in this area to be a patchwork quilt.").

<sup>28</sup> Compare e.g., "susceptible of discretion" analysis applied in *Dube v. Pittsburgh-Corning*, 870 F.2d 790 (1st Cir. 1989), *petition for reh'g denied* (May 23, 1989) with "traditionally governmental" activity analysis applied in *Smith v. Johns-Manville Corp.*, 795 F.2d 301 (3rd Cir. 1986).

<sup>29</sup> *Trevino*, 865 F.2d at 1480.

As a practical matter, unless reversed, *Trevino* will undermine contractor confidence in the *Boyle* defense. This, in turn, may discourage government contractors from competing for essential military projects. At the very least, *Trevino* will encourage unnecessary increases in procurement and insurance costs. From a public policy standpoint, the Fifth Circuit's decision underscores the ineffectiveness of complex tests for determining contractor liability. A less complex test for determining government "approval," like the *Yearsley* test discussed below, would substantially minimize judicial inquiry into military decisionmaking and add certainty to the scope of the government contractor defense.

**A. Determining The Nature And Use To Which A Product Is Put Requires No Judicial Intrusion Into Military Decisionmaking.**

The unnecessary complexity of the Fifth Circuit's definition of what constitutes government "approval" under *Boyle* could have been avoided had this Court adopted a simple test for government contractor immunity similar to the one applied in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940). In *Yearsley*, the Court ruled that a contractor was not liable for damages caused when the construction work it performed for the government on the Missouri River eroded part of the petitioner's land. The *Yearsley* Court held that if the authority to carry out the project is within the constitutional power of Congress, "there is no liability on the part of the contractor for executing its will." *Yearsley*, 309 U.S. at 20-21.

The Chamber proposed the adoption of a "Yearsley-type" defense as *amicus curiae* in *Boyle*. While the *Boyle* Court did cite *Yearsley* as being the closest it had ever come to accepting the government contractor defense as a matter of federal common law,<sup>30</sup> it chose instead to adopt a three-part version of the government contractor

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<sup>30</sup> *Boyle* at 2514.

defense applied by the Ninth Circuit in *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 462 U.S. 1043 (1984). As *amicus curiae* here, the Chamber re-emphasizes the merits of a *Yearsley* approach to government contractor liability and urges the Court to consider a *Yearsley*-type analysis for determining governmental "approval" under the first prong of the *Boyle* test.

Grounded in the notion that a government contractor ought to be protected from liability if it is performing at the behest of the government, a *Yearsley*-type "approval" test would prevent courts from engaging in the degree of unbounded scrutiny of government participation in military product design required under *Trevino*. Under a *Yearsley*-type "approval" test, the judiciary need only determine (1) the nature of the product and (2) the use to which it was put. Absent fraud by the contractor in the procurement process, the contractor would be protected from tort liability for "uniquely military" products that were put to "military use." "Uniquely military" products include those products that were specially designed and produced for the military as well as commercial products that were put to military purposes or materially altered for military use. Commercial products supplied to the military, as is, and used for a purpose not uniquely military would fail a *Yearsley*-type "approval" test. Hence, determining whether a product is military or commercial is comparatively simple and requires no intrusion by the courts into military decision-making.

Similarly, evidence that a product was put to a "military use" can be proved in several ways, none of which require the judiciary to second-guess government procurement decisions. The contractor can meet its burden of proof simply through (1) government testimony in court that the goods were acceptable; (2) government affidavit attesting the product's use; or (3) *evidence, as*

in the case at bar, that the goods were placed in service and successfully used for their intended services. Proof of any one of these would demonstrate that the government received the product it desired and found it acceptable. This type of evidentiary test renders unnecessary the kind of judicial second-guessing required by *Trevino* as to whether the government conducted a "substantive review and evaluation"<sup>31</sup> and exercised its discretion "over significant details and all critical design choices." *Id.* at 1481.

**B. A *Yearsley*-type Test Advances The Separation Of Powers Principles Which Are At The Heart Of The *Boyle* Defense.**

Judicial and civilian scrutiny of the "[d]ifficult choices, tradeoff, and compromises inhere[nt] in military planning that simply find no analogue in civilian life,"<sup>32</sup> violate the separation of powers principles from which both the *Boyle* defense and the discretionary function exception evolved. As discussed above, this Court intended the *Boyle* defense to safeguard the notion that the judiciary refrain from second-guessing military decisionmaking:

[t]he selection of the appropriate design for military equipment . . . involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including, specifically the trade-off between greater safety and greater combat effectiveness. 108 S. Ct. at 2717.

The government "approval" test imposed by *Trevino* undermines the very policy *Boyle* hoped to enforce. A *Yearsley*-type test for determining government "approval" would preserve the purpose of these principles by precluding suits by servicemen and civilians against the contractor who is doing work for the government.

<sup>31</sup> *Trevino*, 865 F.2d at 1480.

<sup>32</sup> *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986).

**CONCLUSION**

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully urges this Court to grant the *Petition for a Writ of Certiorari*.

Respectfully submitted,

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October 2, 1989

